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A CHANGING PENAL ECONOMY IN FRENCH SOCIETY:  
IN SEARCH OF A HISTORICAL VIEW

Philippe Robert & Rene Levy (+)

Abstract: Reanalyzing available historical studies that deal especially with the end of the Ancien Regime and the XIXth century, the authors take a historical view highlighting the current recomposition of the penal economy of contemporary France.

I. INTRODUCTION

We shall try in this article to integrate the results from historical research into the sociological approach of a contemporary problem, in order to reorganize its understanding. We shall stick to the French case. But before that we have to ask ourselves why the sociologist has a need to refer to the results produced by another scientific discipline. One can see in it a result of the decrease of influence of the structuralist model (including the structuralist marxism elaborated by Althusser). It is as though one had now to rely on an historical reference very prestigious in France thanks to "les Annales"(1) movement. But it might be wrong to only consider it as an intellectual fashion: this need for temporal background might express a feeling to live a moment of an accelerated transition in which the sociologist needs some proper tools to analyse the change. As far as penal problems are concerned we have this very feeling that categories of analysis worked out for most of them at the end of the 19th century and at the beginning of the 20th century, allow us less and less to understand social practises that have been undergoing a massive recomposition for the last thirty years.

How can history help to understand the present change? At first sight it seems that it puts even more apart today's situations and their past. Historical discipline which expresses itself in terms of time rather than concepts does not provide the sociologist with theories and categories already made, but the temporal view it allows can make him rediscover what he tends to forget: the contingent character of his object and of his concepts. Apart from that, it makes us break with a far too simple conception of the change as a homogeneous and global phenomenon. The social history and the "histoire des mentalités" blows out the synchrone vision where different elements of a given situation are all envisaged in the present, whereas they in fact refer to different shapes of spreading of duration (ibis): time of behaviours, time of institutions and time of the representations do not usually have the same speed.(2)

"Appropriation" by the sociologist of the historical analysis of a social object is not obvious. It has to confront itself to a certain number of conceptual and methodological difficulties which will not be dealt with now for they have been analysed elsewhere.(3) On the other hand, historical contribution on penal matters is extremely different according to the different period.(4) As far as french history is concerned, it is quite important for the 17th century and 18th century, much less for the 19th, and

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reduced to very little for the beginning of the 20th century.(5) It is therefore impossible at the moment to envisage a complete historical view but we could, using some key moments, try to reconstitute the "penal economy" of each of those periods: not so much describing the institutions, their rules and their specialized processes but rather the articulations that are characteristic of their relation at this time as well as the situation and role this ensemble has in the social formation under consideration. This method does not permit us to explain how one "penal economy" turns into another one, but it allows at least to show the difference between them.

Considering the key moments and the possibilities offered by historiography we chose to consider for this article three main moments: end of the Ancien Regime, the 19th century and our time. The first moment allows to see the "repressive economy" of the Ancien Regime in its fullness and to see the symptoms of its crisis; the second moment is the building and the stabilisation of a repressive model which will last till the end of the 1950's. As far as today's situation is concerned it seems to open a new period: it is rather difficult to tell what characterizes it but it is already obvious that the penal model of the 19th century is deeply reorganized.

## II. PENAL ECONOMY OF THE ANCIEN REGIME

The penal economy of the 18th century described by historians is the result of a slow and long-lasting evolution which mainpoints we will now remind. It did start with the apparition of the state(6), in its modern concept, between the middle of the 13th and the 14th century. Progressively, a centralized imposition, the tax-system, justified by the war and for the greatest part redistributed to the nobiliary class(7) is added to the direct seignioral levying, whose relative return declines for very complex reasons. The state, tool of this process of extraction-redistribution is introduced through the figure of the king(8), maintained through the middle ages but which then changes from supreme suzerain of the feudal pyramid into a direct sovereign(9) obeyed by all his subjects even if they are his vassals' subjects. This movement will build up the notion of national territory.(10)

Penal justice was born with this State and is part of it. What jurists believe to be the irruption of the inquisitorial procedure(11) is in fact the fractioning of justice and the apparition of a new form of court action. What gives meaning to the constitution of a penal realm is not only the existence of a few public offences, most of them of lese-majesty (punished by some sort of exclusion) but the extension of this model to private conflicts in which the sovereign is substituting himself for the victim to act as the plaintiff. It is then that the distinction between penal and civil matters appears. It is then too that the penalty appears, whereas before there was only compensation with an indemnisation for the suzerain's arbitration added. In the model of the criminal trial the sovereign is no longer a more or less compulsory referee but is a judge and a party considering that the offence is made against the interests of public peace that he represents.

Not only the very idea of the penal induces a State sovereignty but its concrete emergence depends on each very peculiar modality of each State. In France the development of the "proto-State" of the early middle ages was characterized by the change of curia-regis into an attempt of central administration and too, in a more concrete way, through the extension of the Crown lands which will lead to the creation of a local administration. The actual criminal function will appear within the new concept of administration; this goes for the central level (parliament) as well as for the local

level (baillage).(12) It was as well within the administration of the Crown lands that the Public Prosecutor (les gens du roi)(13) so typical of french justice, appeared although slowly and with difficulties. Historiography of the criminal justice within the french early middle ages and the pre-absolutist State leads mostly to works on history of the law(14) which does not provide us with much knowledge on the functioning of the repressive process, its effectiveness and its part in social relations.(15) The historiography gets more abundant with the period of the absolutist State.

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The preeminence given by the jurists during the 18th century to the king's laws cannot hide their limited and subsidiary use, which was to make the rule of procedural practices(16) and to formalize certain incriminations especially when royal or moral matters were concerned. Criminal law of this absolutist State is a *Juristenrecht* more than anything in which a doctrine based upon modern *jusnaturalism* and rationalism operates a synthesis of different springs (roman law, customary law, kings law and precedents).(17) In this criminal construction, justice is far more important than law: nevertheless it is difficult to know who can be the judge because the power of Justice is so linked to the image of the king that any royal officer can act as a judicial officer; even royal commissioners are often given jurisdictional competences.

If we try to stick to the judicial society the difficulty is just the same; justice seems to be diluted into many different ways: royal justice, seignorial justice, town justice, ecclesiastical justice. Even royal justice, the most important as far as criminal matters are concerned, knows of many special courts which co-exist with common ones. Even when those are concerned there is a social gap between high rank justices and the rest of them.(18) Sentences are left to the judge's discretion which proves his preminent role. What is more, the sentence does not generally imply a long-term taking in charge of the sentenced(19); far from constituting an independent part of the criminal process with its own institutions, the punishment is reduced to an appendix of the justicial action. The scale of the penalties is generally described as "shattered" by the co-existence of corporal punishment and of measures very little effective without intermediate penalties in-between. We can wonder if this statement is not an anachronism: we may not be able anymore to perceive how efficient those penalties like pillory or banishment, which affect honour or produce exile, were at their times.

Likewise the police function is only one of the aspect of the judge's charge even though the absolutist State has given (in fact if not by laws) such an institutional autonomy to certain institutions that their police function overrides their jurisdictional functions. The organization of the police is to know at this time of very important changes that are difficult to understand, decisive from a certain point of view (especially as far as rationalization is concerned) but derisory from another point of view.(20) From this point of view, the main event is the reorganization of the parisian police through the creation by an edict of 1667, of the *Lieutenant-général de police*. This function appears to be part of the local judicial organization but in fact it is part of the central administration because of the importance of the maintenance of order in Paris and because of the political informations provided. As far as parisian administration is concerned the *Lieutenant-general* has a competence that does exceed the police function and that includes a certain judicial competence and wide administrative attributions. The main parisian police worry (with its thousand men at the end of

the Ancien Régime), seems to be its ability to maintain order, avoiding explosions of violence in the popular areas; then, at the end of the period, it acquires another purpose which is to "cleanse" the streets by getting rid of those who live on the street.(21)

In spite of a 1699 edict, the model of the *Lieutenance-générale* will not spread outside Paris with the consequence that the police organization in other towns will remain at an embryonary state. This way the only other important police institution is the *Maréchaussée* which became a specific police for main roads and countryside. Two important reforms during the 18th century rationalize the structures of this institution and its implantation. But in spite of those reforms, the lack of strength and the competition between the different competences will restrain the efficiency of this rural police with only four or five thousand men at the eve of the revolution. As far as the police competence is concerned the *Maréchaussée* does not deal with internal conflicts in the villages and is incapable of coping with any important seditious movement or with groups of roadrunners. What is more there is no support from rural populations scared of reprisals from those they would have given away so that the *Maréchaussée's* "pray" is usually the isolated roadrunner.(22) The weakness of the *Maréchaussée* forced the authorities to use other specialized forces, among which the private guards from the *Ferme générale des impôts*(23) tax collectors and the *archers de l'hôpital* whose attribution was to collect roadrunners who were to be sent to the general hospital.(24)

As far as the militia is concerned (created in 1688 and reformed in 1742) its function of auxiliary of police is described with scepticism because of resistances met by this form of armed service.(25) Finally the last recourse was the army(26) especially after Louis the 14th reorganized it and introduced the quartering in barracks. This reform and the decrease of taxes at the end of the 17th century have been important in the decrease of main popular emotions endemic since the 14th century; they will reappear at the beginning of the Revolution(27) in a context of a decline of the absolutist state and especially of its police and justice.(28)

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If we want to actually appreciate the part of the penal realm in social relations we have to be sceptical with the theories voiced by the royal jurists during the early middle-ages and at the beginning of the modern period. Numerous recent research show a penal justice whose interventions are rare and reserved to some royal matters or to scandals so obvious they would trouble the public order. The exemplarity is then only used to conceal the rarity of its interventions. As far as the rest of the interventions are concerned, which are less prestigious but important to understand because they represent the concrete "repressive economy", we realize that the penal intervention does depend on the initiative of the complainants and of their abilities to pay, for they advance legal costs. The complaint is then part of the social relation which determines it: it is then only a mean among others to ameliorate one's position in a *négociation* or to diminish the opponent and to force him to come to terms or accept an arbitrament.(29) The justice of the Ancien Régime is quite satisfied with this subsidiary role that corresponds to the limits of its means and to the conception of the royal power.(30) It is as if it limitates itself to lead the different parties to an agreement and by doing this reinforces the domination of the local elites whose members organize these compromises.(31) To reach that, justice uses double dissuasion: towards the accused, judicial discretion, preventing any accurate evaluation of the risks he is taking(32); towards

the plaintiff the unpredictability of legal costs. This way they both have the feeling they should compromise in a society where every single person has something to loose (money or position) ... except for the sans aveu (disreputable people) theoretically judged by the expeditive justice of the prévôts (provost).(33)

This provost's justice is part of the management of poverty that relies on the notion (going back at least to the 14th century(34) but considered with reluctances till the end of the Ancien Régime(35)) which tends to isolate as much as possible the "bad poor" which is to say the unactive valid person. Recent historiography reconsiders the effectiveness of the grand renfermentement(36) of the second part of the 17th century, but does insist on concrete realizations of the 18th century: dépôts de mendicité, charity workshops and especially development of home assistancy.(37) The clever penal economy of the finishing Ancien Régime came to a halt when local communities started loosing their control over their members, between 1770 and 1780(38): cases that cannot be solved through compromising and arbitration and which royal justice cannot manage are multiplying. Such a crisis situation which is part of a wider crisis of the absolutist State and of its role in social relations will unknot in a recomposition which leads to a new "repressive economy".

### III. FROM A LIBERAL STATE TO AN INTERVENTIONIST STATE: BUILDING A NEW PENAL ECONOMY

The pretension will deeply change: we can trace this in the transformation of the juridical figure of the sovereignty. The sovereignty of the absolutist monarchy had little to do with social relations. It above all pretended to represent on top of the civil society the absolute sovereignty of the eternal as a protective and justiciary sword. In the revolutionary and post-revolutionary society the national sovereignty pretends to include the whole society. It subsumes all its members into an abstract and indivisible totality from which nobody can escape. Then the state as the concretisation of the sovereignty is represented as the potentially total incarnation of the social ethic.

However, the liberal state develops only partially potentials of its sovereignty because it only reaches individuals as abstractedly equals in its law. "Indirect Administration" in Kelsen's words(39), constitutes its typical way of action. Then penal function appears as an essential aspect of this state: penal justice based upon a strict legal definition of guilt(40) is only aimed at the prevention of new offences.(41) This aim of special an general deterrence is pursued through the threat of a sanction. The post-revolutionary penal system which is not structured around the judge any more but around the law is going to develop an "indirect administration" on a large scale: first of all through a systematic judicial implantation, then through development (at the lowest possible cost) of organs capable of sustaining the execution of sentences (prisons and convict goals), then through progressive construction, first in Paris then in the countryside, of institutions specialized in crime detection and referral (police and gendarmerie). The court-system is the first piece in the penal puzzle to be set up. After some experiments during the Revolution, it acquires with the First Empire, a form which will not be modified for a century and a half; a heavy hold of the executive (preeminence of the public prosecutor); a very hierarchical structure of the judicial society; reestablishment of an inquisitorial preliminary investigation; limited use of the jury system (major offences only).(42)

Foucault's thesis about punishment in the 19th century has been the main focus of recent historical debate. Foucault made two points: reformators attacked "the economy of corporal punishment" (supplice) in the name of a diversified pedagogy of sanction ... to finally obtain the prison monotony; the prison constitutes the center of the penal repression: through imprisonment, illegal actions committed by the working-class are branded as criminality and thus definitely separated from the more obscure illegal actions of the bourgeoisie.(43) This thesis has been revised from four points of view.

- a) The brutal rupture was not that obvious: penal economy of the 19th century proceeds through recomposition of previous elements or experiences.(44) The brutal change is due to a quantitative difference of the court's case-load and of the duration of certain kinds of punishments. The prison is only a consequence of the mutation of the role assigned to the penal repression.
- b) On the other hand, contrary to the intentional logic of the discourses on prison, recent works underlined the variety and the apathy of penal practises and counter-practises and the importance of the resistances, especially the revolts.(45)
- c) A periodisation can now be offered(46): till the years 1830 the combination of a philanthropic discourse and of a praxis based on buildings confiscated during the Revolution, on wardens recruited among retired army men and on management left to private undertakers. From the middle of the 1830's to the end of the 1850's a more "realistic" discourse built upon deterrence and upon the start of construction of prisons. Then 1860 sees the slow relative decline of the use of prisons.
- d) Finally as fascination with the prison has faded a way, it has become easier to look at the other penalties: it appears that, till 1850, imprisonment was coupled with convict gaol(47); afterwards with transportation overseas(48), until the implementation of suspended sentences turned this penal duet into a trio.(49) Beside that, many institutions appear that are dedicated to young offenders. From the Monarchie de Juillet till the end of the Second Empire (1870) the treatment of those offenders is dominated by a philanthropic spirit, more and more religious. Then there is a brief period when the Corrections Service becomes hegemonic. Finally, we see the philanthropic management back again, but this time less religious and we observe the beginning of the system of probation in the early 20th century.(50)

In spite of the creation of the *lieutenant-général*, the development of the police will be rather slower and more belated in France than generally admitted. At least until the Second Empire the police is used as an intelligence service and as a political police. On top of that the police is not unified, crippled by internal struggles and mostly concentrated in Paris.(51) The development of the police during the Second Empire will remain essentially parisian. Beside Paris, only twenty towns have a correctly organized police at the fall of the regime.(52) Then the evolution will be rather chaotic and dominated by the establishment of state control over communal police in the provinces.(53) As far as the *Gendarmerie* is concerned the process seems quicker: there is a perfect continuity from the *Ancien Régime's* statutes to the revolutionary acts. From 11 000 men in 1792 it reaches 30 000 during the *Grand Empire* but with a special interest in military policing. During the *Restauration* between one third and half of the men will be kept and used for judicial and maintenance of order tasks in the countryside. Since the Revolution there had been attempts of creating a municipal rural police (*gardes-champêtres*) but it does not seem to have worked out properly.(54) The important repression in rural and forestry delinquency seems to be due to the *gendarmerie* and agents from the *Eaux et*

Forêts administration. The maintenance of public order will for the main part be secured, until end of the century, by the army whose attributions include the guarding of prisons, urban patrols with the National Guard(55) and the repression of all the riots. The army will gradually be replaced in this role by Gendarmerie squads (1921) and police squads (1947) specialized in the maintenance of public order.

The statistical reports now regularly issued reveal a justice with a precisely defined target.(56) At the beginning of the "statistics epoch", during the second third of the 19th century, we see the justice busy curbing forest crimes attributed to a rural proletariat, which might mean a struggle against food disturbances, may be too the repression of conflicts about common spaces or which used to be common. Then those rural preoccupations will not appear any more, the penal system being very busy controlling the urban proletariat; it seems that the main preoccupation was to inculcate upon it the respect of private estate (repression of theft), and morals (repression of petty sexual offences) and finally to erase the habit of selfjustice (repression of interpersonal violence): the respect of the state monopoly of violence must be taught, which is contradictory to the ethic of social relations based upon honor and its protection.(57)

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So much about the official aspect, its discourse, its pretensions and its practises. To have an idea on "penal economy" and its place in social relations means more informations; it is a pity not to have for the 19th century such studies as those on non judicial settlement of disputes during the 17th and the 18th century. Yet some works on rural society - and most of France is rural - make us believe a persistency of traditional behaviours. Local communities have either kept or refound, in front of a State perceived as menacing, a sufficient strength to use penal procedure as a subsidiary recourse only. The complaint appears to be only one weapon in local procedures of dispute settlement, a mean to force an agreement or to have a more favorable one.(58) The opacity of rural communities (and of ethnic areas of the big cities) will not diminish before the last third of the century: only then will the network of solidarity and mutual control become loose enough to allow the establishment of a direct relationship between the State and the individual. The great economic crises of the last decades of the century and the great migration towards cities it caused reinforced this trend. To put it briefly, it is only at the end of the century that french society will become less rural, and rural society become less closed to the State's institutions.

At the same time the penal model gets more complex: beside the deterrence through penalty appears the diagnosis of dangerousity, which can lead to elimination if considered incurable or to "treatment" if considered curable. To say the truth the consideration of dangerousity has never been completely missing from the "repressive economy": officially ignored during the "classical" period (i.e. of the liberal state), it nevertheless has been used to prevent the fails of deterrence.(59) Yet at the end of the 19th century the place reserved to dangerousity ceases to be strictly subsidiary and a genuine reorganization of the repressive doctrine takes place(60); the history of this inflexion has just been very accurately studied by Nye (1984) who bases his demonstration on notions of "degeneration" and "national decline".(61) The pole "elimination" is represented by the transportation of recidivists relegated according to the 1885 Act; and the pole "treatment" through the penal regime of juvenile delinquents. This aspect of "treatment" even if mostly verbal makes another one appear which is more linked to the "direct administration" rather than to the model of "indirect administration". It is then in fact that the State social control tends to become more interventio-



nist and reduces the use of the penal system to only one aspect among others which borrow much more systematically from the model of "direct administration": compulsory school, public health system, industrial legislation, repression of alcoholism, children's protection ...

The numbness of the french sociology after the first World War and the thinness of historical works focussing on the first part of the 20th century pair to create a gap in our empirical documentation. Yet we could admit a certain stability of the "repressive economy" so settled. For almost one century it does not seem to have deeply changed. Everything started to move after the 1950's. The picture of the today repressive economy lets deep changes appear: a genuine recomposition is taking place without generally letting the nature and the characters of the mutation appear. Penal matters are mentioned the same way as during the past century without realizing that a historical mutation has been taking place for over 25 years. This misreading reinforces the atmosphere of "crisis".

#### IV A CHANGING PENAL ECONOMY IN THE CRISIS OF THE STATE

To examine every indicator that seem to point out a mutation of the penal realm that has not been known for one century would mean a very long and technical demonstration: it is not quite the purpose of this paper and has been produced elsewhere(62), so that a repetition would be superfluous.

Let us stick to the essential. Our interest being on penal economy, its place and its role in the social relations, let us take a look at the indicator of the earliest stage of the penal processes, at a time when it is still possible to discern the players, the odds, the winners and the losers. The changes in the meaning of complaint seems to be at the core of the current "crisis". The careful examination of the police statistics lets guess an unprecedented increase of complaints from individuals(63) generally because of an attack against movable property. Several considerations probably allow us to explain this fact. First of all the dissemination of goods that are not rare but still precious and highly valued such as cars and domestic electronic appliances. Then the generalization of lifestyles that, as far as housing is concerned, made impossible the old and traditional permanent supervising of the estates: separation of living zones (work, leisure, habitat), early ending of cohabitation of young and old people, disappearance of servants in bourgeois and middle-class housings, multiplication of country houses for those categories. We have to add the generalization of insurances against theft and the immatriculation of certain goods (cars, identity cards, check-books, credit-cards ...) which make the complaint compulsory to get a refund or to disclaim one's liability. Last but not least there has been a change in the meaning of the complaint. In traditional societies, the historical works present it as a strategical approach, generally directed against a precise person and in any case dependant on the mechanism of negotiations deeply immersed in the narrow net of the relations, restraints and hierarchies of the local society. Now on the contrary it appears generally to be a more automatical than strategical behaviour. It is directed against something rather than against somebody, just because the plaintiff has no idea about the identity of the delinquent.(64) Far from being a subsidiary in a mechanism of regulation ruled by a local community, it expresses the disappearing of such possibilities. In short it appears like a summon directed to the State to make up for the social gap produced by the anonymity of the author and the disappearing of microregulations.

It is then part of the redefinition of the place of the State in social relations, but the aim here is not to claim for "less State" as the leitmotiv very much used in many other matters. On the contrary it is a need for a State guardian of social relations ... And maybe those groups which shout "more State!" are not that different from those that shout "less State!" in other matters. The ambition to measure the degree of generalization of the complaint, the gap between those who consider themselves as victims of an offence and those who actually file a complaint is probably difficult to meet, because of the shortcomings of victimization studies.(65) We can at least note this recent banalization of the complaint behaviour (without being able to say if it affects equally the different social groups). For the first time in the history of state societies, we might get closer to the theoretical legal claim which leave to the State the monopoly of the repression.

In that case we have a paradox: of all the cases that the police records, those emanating from individuals are the least taken care of; tendentially they are hardly handled(66); in 85% of the cases an individual complaint concerning an attack on property remains uncleared by the police, which forces the justice to drop the case. Clearing up a case is possible only if the plaintiff can help identifying the author or if the police catches someone in the act, while doing its regular duty of maintaining order in public places. Altogether, these cases are quite numerous, but their number is negligible compared to the overall amount of complaints. Everything goes as if the State abandoned the management of this type of cases to the insurance companies and to the market of security-services. But at least presently, this attempt of privatization meets strong oppositions: unfavorable evaluation of the balance between costs and advantages of those private services, reserves to monetization of symbolic or practical values, refusal to accept the withdrawal of the State from the protection of persons and their estates.(67) The contrast with the lot reserved to other types of cases, reinforces the paradox that has just been described. If private complaints are very rarely dealt with by the penal institutions, those emanating from organizations are very well handled. It can be private organizations which have an in-house security department empowered to control a private territory open to the public, in accordance with their property rights (typical example is given by the big supermarkets or department stores). Those security services deal with the majority of the disputes through transactions often leonine. Yet they appeal to the penal system in a minority of cases either for the value of the example or to get rid of "awkward customers". These cases being already cleared-up and the conditions of referral prenegotiated between the official and the private police, the handling of those cases is not a problem: 80% of the police reports concerning them can be handled by the justice (a suspect having been identified), as to only 15% concerning other thefts.(68)

The contrast between those big organizations which can afford a private police and optimize their relationship with official police, and the individual owners, who turn forward to the State because of the lack of other recourses but do not get any answer, is striking. Other private organizations cannot claim their ownership because their activities do not take place in a defined space. They then try to get delegated State prerogatives to police their own professional fields. Banks for example can legally control and sanction the users of bad checks. There again a certain number of cases, a minority in relative value although numerous in absolute value, are transferred to the penal system. There again clearance is not a problem but the handling by State agencies can be a problem because of the important number of cases. Through the example of banks we get to a third type of cases: an

important number of State agencies use police powers for the defence of the State patrimony or for the management of a sector of the economical or social life. There again the main part of the cases is disposed of through transaction but a small amount in relative as well as absolute value is transmitted to the penal system (for the same reasons as in the case of security services).(69) The clearance of the cases is not a problem even if the differences between administrative and judicial logics get sometimes on the way of the penal handling.

There is a public administration which activity generates a very big number of cases: it is the police itself whose main task is the maintenance of order in public places. It produces an even more important number of cases because the police hasn't any official power of transaction. The maintenance of the public order is nowadays mostly a problem of road traffic: 85% of the reports transmitted to the justice by the police are aimed at traffic regulations.(70) Another but much smaller problem are those "victimless cases" concerning various State regulations, as for example the foreigners' policing. Their clearance is not a problem since there is no police report where no suspect can be found.(71) And as the police belongs too to the penal order, those cases are not separated between two logics. They constitute what the penal system can deal with the most easily, except when the number of cases clogs the system. Finally among all the cases, the individual complaints are the less handled (in relative value) at the very moment when those complaints become more widespread than ever for complex reasons. Never before the penal theory and its claim for monopoly has been so widely accepted. But it is a Pyrrhus victory: the State makes obvious its incapacity to deal with what it has been claiming for so long and this, despite the enormous means it has in penal apparatuses (especially the police). Things seem to be easier when the claim for monopoly is not respected, when the organizations handle themselves most of the cases, sending only a tiny part of it to the penal system ... or if it consists of subproducts of the maintenance of order by the police in public places. This is why the penal figure of the State might loose a lot of its credit. This "model of indirect administration" seems to be in a "crisis" situation. The misappreciation of the parameters of the crisis increases the uneasiness and reaches the State in one of its central figures, contributing to nourish its loss of legitimacy and the controversy about the place and the role of the State in social relations. The fact that the complaint is often the only possible thing makes the matter even more touchy; in other words it means an impoverishing of the capacities of the "local" social regulation and a summon directed to the State to make up for this emptiness in the social relations. Its deficiency with such an illimited though fundamental request can be taken by some people as a figure of social death.

## V. CONCLUSION

We think that looking at things from a historical angle as we just attempted to do, helps to renew the sociology of contemporary penal matters: their state of "crisis" appears to be the demonstration of a more than usual accentuated gap between practises undergoing quick changes, institutions very little modified except in their functioning, and ways of thought - either commonplace or "scientific" - that are obsolete. Used to deal with an overall stable number of cases for over a century, the penal system is now meeting a very fast and massive increase in road traffic, checks and theft cases: it manages with increasing difficulties the traffic and check problems and handles less and less the theft cases. Consequently, deep social conflicts tend to surface. The debate upon the protection of persons and above all of their estates crystallizes the oppositions on the role of the

haustive picture of the registered prostitutes. First of all, we only have the brothel inmates, and second, there are no more data on them than the census ones, i.e. age, place of birth, and sometimes change of address. Still, the emerging picture is analogous to the one of the brothel keepers in that the relevance of officially-assigned class categories is unmistakable, and that these categories may be said to mirror the division of mid 19th-century urban society in general.

## 2.2 THE PROSTITUTES

The 19th-century view of the public woman is polemic and normative to such an extent that most of the contemporary writings cannot contribute to a better understanding of what prostitutes were really like. Defenders of the abolition of regulation emphasized her miserable fate: doomed to lose her charms and wrecked by disease, she would progressively glide down the clientele scale and die a wretched death. This picture was above all a weapon against the administrators who marginalized these unfortunates even more by putting them on registers and incarcerating them in brothels, hospitals, and prisons; it is very seldom accompanied by any serious empirical analysis.(54)

Regulationists such as Acton, on the other hand, sustained that the bulk of the prostitutes subsequently "become the wedded wives of men in every grade of society (...) and often live in ease unknown to many women who have never strayed."(55) This could only justify registration, since public women could not be marginalized anyway; as they ultimately returned to the "honest" world, they had to be kept morally and physically clean in the meantime so as not to soil it.

The same argument is formulated by Parent; yet the image he gives of the prostitute's career is considerably more differentiated than the former two(56), as he took the trouble to look at hard facts. Like contemporary research, he stresses the temporary character of the prostitute's occupation; most prostitutes start young and retire young. At the moment of inscription, 60% of the registered Parisian prostitutes of 1831 were not older than 22. The actual registers contained no more than 6% women of 40 and beyond.(57) For the 1872 - 1901 period, age at inscription was located in the 21 - 25 bracket(58); it must be noted that in the second period prostitution of minors was forbidden. As, in England, the age of consent was 12, many prostitutes were no more than children, according to Finnegan(59); yet Walkowitz points out the self-regulating nature of Victorian prostitution to argue that this sort of unfair competition was presumably driven off the streets.(60) She also found registration to have had marginalising effects in that the mean age of the listed prostitutes of Plymouth and Southampton gradually increased.(61)

In the case of Brussels, we did not find evidence of many analogous process at work; median, mode and mean age of the brothel women remain within the 22 - 25 bracket throughout the period.

This view is, however, distorted by the fact that first-class-brothel women outnumber the others. There is a difference in age according to the category(62): one-third of the prostitutes in third-class houses is older than 30. Second: 5%, first: 4%. 49% of the upper-class-brothels' inmates are no older than 23, second: 41%, third: 29%.

Corbin has noted that in most cases, the registered prostitute and, more strongly so, the brothel inmate is foreign to the city(63); this he attributes to a desire for anonymity and the brothel-keepers' recruitment techniques - often they would have girls sent over from other cities or from abroad. Examples of this are to be found in the Brussels archives, at both high and low level. As a result, no more than 9% of the Belgian women are

born in Brussels. In the case of the brothel- and 'maison de passe'-keepers, this proportion is 25%, which is surprisingly low; but in this group, an additional one-fifth was born in the vicinity of the capital, whereas the prostitutes migrate from further-off places. Again, a marked difference between the classes: a minority of the women in upper class brothels are Belgian. This is true for about 65% of the second- and 90% of the third-class women. Within the Belgian population, there is a pronounced difference between the Flemish, the Walloon and the Brussels-born subgroup, the first and last of these clustering in the lower brothels, the French speaking Belgians in the other. The same could be found for the brothel-keepers.(64) Not only do the luxury brothels recruit their personnel from further away, but these women also migrate abroad much more often(65), especially to and from Paris - Parent already noted the existence of a traffic between both cities.(66) The second class women move between the different Belgian towns, whereas the third class inmates shift between the various lower brothels of the capital. There is practically no example of a prostitute's moving out to live at a "civil" address in Brussels, which points to the impossibility of leaving brothel prostitution, or registered prostitution in general, without having to actually disappear. The turnover rate was much higher in upper-class brothels: 27% of the women stayed less than a month before moving on again, half of those did not remain longer than one week. As the prostitutes in lower houses served as waitresses as well, we may expect their length of stay to be more extended: indeed, 69% remain longer than a year, which is true for no more than 30% of the second - and for a mere one tenth of the first class women.

As the census data did not allow us much more than a snapshot of the brothel inmates, we do not know what became of them. The demographic profile in each of the classes is so different, however, that we may support Parent's view(67) that those prostitutes falling from the first into the third category are an exception; when too old for upper-class brothels, they left brothel life altogether.

The Brussels data, like all other evidence, point to the female labour market's unattractiveness as the main reason for prostitution: 60% of all the brothel women were listed as seamstresses, dressmakers, embroideresses, artificial-flowermakers, etc., the overworked, underpaid and insecure jobs which were most women's only option. There is no reason to assume that the cited occupations were "alibis", as the women were listed as living in the brothel and their register number was put beside their name - typically, in these demographic sources, prostitution is seen as a state (like the military) instead of as a profession. The proportion of domestic servants is much lower; different lists suggest that they resorted more often to clandestine prostitution. 9% came from the unskilled labouring occupations: charwomen, daily labourers, and so on. No more than 8% were recruited from professions with a slightly higher status (though not necessarily higher pay or stability): 'demoiselles de comptoir', artists, and governesses. Except for the latter two subdivisions (the first is found exclusively in the lowest brothels, the second only in the highest), there is no difference in occupational recruitment between the brothel categories. The urban labour market's harshness to women profited to the entire business indiscriminately.

### 3. CONCLUSION

In the case of the utopic experiment of regulated prostitution, discourse and reality always seemed to take divergent directions. The administration was not alive to the discrepancy existing between the closed-brothel dream

- penal jurisdictions. (Lorgnier, Martinage, 1979); Martin (1980); Cameron (1981, chap. 4). In fact it reaches a population characterized by an absence of station (gens sans aveu): its intervention does not seem to be frequent. In fact after the creation of beggars depots the Maréchaussée will act more against the roadrunners through administrative procedure (on the functioning of the "justice prévôtale": Hufton (1974, 219-244, Castan N. (1976; 1980a, 176-195), Lorgnier and Martinage (1979), Martin (1980), Sturgill (1981: chap. 7), Cameron (1981).
- 34 See especially Mollat (1978). On social exclusion: Le Goff (1965, 387-396; 1977, i979)> Allard (1975)-
  - 35 Farge (1979b), Nicolas (1981), Hufton (1974, 139-142);
  - 36 Foucault (1972), ~~Le Roy Ladurie~~ (1981, 432);
  - 37 On the management of poverty in the modern period see: Gutton (1971, '73; '94)J Hufton (1974), Chartier (1981).
  - 38 For the Languedoc, see: Castan N. (1980a,b,c), Castan (1984).
  - 39 Kelsen (1983> 127).
  - 40 Michel Van de Kerchove (1981) demonstrated that, even in the "classical period", the dangerousity had survived as a subsidiary principle used to fill up gaps left by the principle of guilt.
  - 41 Beccaria (1966, 83,86,96) has given the best description of the finality the penal system assigns itself in our societies.
  - 42 On judicial society, see for instance Royer (1979), Royer, Martinage, Lecoq (1983); Debré (1981), Masson (1977). See also a few monographs on procedural questions: Davidovitch and Boudon (1964) on the prosecutions abandoned by the State prosecutor, Donavan (1981) on the jury, Robert (1969, 80-114) on the juvenile delinquents law, Schnapper (1978) on paternal right of punishment, Foucault and al (1973) on psychiatric experts reports, Levy (1986) on "flagrant délit" procedure ...
  - 43 Foucault (1975); on the discussion of those thesis by historians, see Barou and Perrot (1977) and Perrot (1980a, 9-56).
  - 44 Deyon (1975), O'Brien (1982).
  - 45 On Philantrops from the "prison royal society" during the Restauration (1815-1830) see Duprat (1980). On the debate on prison in France during "the Monarchy of July" (1830-1848; Tocqueville and Moreau-Christophe VS Lucas) see Normandeau (1970), Van Bostraeten (1973) and above all Petit (1982 and 1984b) and Perrot (1984) who just edited the writings of Tocqueville on the penitentiary system (Tocqueville, 1984). The controversy on cellular imprisonment, stemming from the debate on death panalty (started by Beccaria and which cristallized with the discussion on the 1791 Criminal Code), will have a new start, albeit in a minorkey, at the beginning of the Illrd Republic with the 1875 law on the execution of short-term sentences of imprisonment. On the gap between theories and practice, see Petit (1984b). The recurring issue of recidivism and the role it played in successive reforms has been studied by Schnapper (1983). On the revolts: Matter (1975) for the first half of the 19th century; Perrot (1980b) for 1848; Boulinguez (1977), from the Restauration to the Illrd Republic; Douailler and Vermeuren (1977) on the beginning of the 20th century. About prison discipline, Fize (1984); about suicide, Chesnais (1976b).
  - 46 Perrot (1975, 81-83 and 1980c), O'Brien (1982); see also the reconstitution of prison statistic serials from 1852 till to-day (Papail 1981; Nabucet, 1981; Tournier, 1981). Nowadays in the historiography of French prisons of the XIXth century, the two main works are O'Brien (1982) and Petit (1984a).
  - 47 Zysberg renewed the knowledge on convict gaoils in the first part of the 19th century (Zysberg 1980b). See also Valette (1980), Bourdet-Pléville (1957), Henwood and al. (1980), Carrière (1981).

- 48 The designing and the vote of the Relegation Act have been analysed in depth by Nye (1984). But the transportation itself has mostly inspired anecdotal works. Nevertheless see Devéze (1965) and Pierre (1982). In any case the corruption and the mess in the management of those establishments make a difference with the strict management of the former continental convict gaols by the Navy.
- 49 On the Beranger Act, see Schnapper (1979 and 1983). For a full understanding of those combinations of successive penalties, we miss an analysis of the importance of fines.
- 50 See Gaillac (1971) who is still essential; also Renouard (1982), Tricart (1981), Schnapper (1978), O'Brien (1982, 109-149), Douailler and Vermeuren (1979). Important bibliography in Costa-Lascoux (1975). The fields of juvenile justice and of social work are the only ones for which the historiography includes the 20th century.
- 51 On this period, the historiography is not very complete: but we have Tulard (1964, 1976), Cobb (1975), Aubert (1979), Forstenzer (1981) and especially Arnold (1979) and Emsley (1983).
- 52 Le Gere and Wright (1973); coll. (1978); Aubert (1979).
- 53 Buisson (1949), Gleizal (1974); Aubert (1979); Cappolani (1981); Delarue (1980).
- 54 Festy (1956).
- 55 On the National guard: Girard (1964), Carrot (1976); Perrot (1980b) analyses the role of this force and the role of the students from the grandes Ecoles in the repression of the prison riots in 1848. About the army, see Vidalenc (1979); also Perrot (1974, 696-698) on the particular matter of the repression of social disorders at the beginning of the Illrd Republic. The historiography of the police function after the end of the 18th century is extremely poor (nevertheless see Emsley, 1983).
- 56 Perrot (1975, especially 75 s.). With Le Compte general de l'administration de la justice, France probably has the best penal statistic of the 19th century. This series beginning in 1825 goes practically to our time, which allowed statistical researches on very long periods (works started under the supervision of André Davidovitch are done at the moment at the C.E.S.D.I.P. by Bruno Aubusson de Cavarlay and al.), which leads to the setting-up of a serialized data base. Another serial reconstitution of the prison statistics since 1852 is in progress at the C.E.S.D.I.P. (M.D. Barré).
- 57 Several works on those various types of cases; some of them general Perrot (1975), Desert (1981); others studying specific offences: Zehr (1976, 1981), Lodhi and Tilly (1973), Chesnais (1976a); some monographs on various french regions: Farcy (1977), Santucci (1979), Ménard (1981), Vibert (1981), Desert (1981), Agulhon (1979: for example 44, 105, 122), Claverie and Lamaison (1982); on cities, Chevalier (1978), remains the princeps work.
- 58 See for instance Claverie and Lamaison (1982, passim).
- 59 See Van de Kerchove (1981) and Robert (1984a, 138-160).
- 60 Robert (1984a, 152).
- 61 Compare with Machelon (1976).
- 62 Robert (1984b).
- 63 Robert (1985a, 66). Unfortunately we have few informations on the social characteristics of those plaintiffs.
- 64 To file a complaint is less automatic when the suspect is known to the victim, see Robert (1985a, 31 and given references, 43).
- 65 See for instance Zauberman (1982).
- 66 Robert (1985a, 59-69).
- 67 See for instance Robert and Zauberman (in print).
- 68 Robert (1985a, 61).

- 69 Robert (1985a, 37 sq.).
- 70 Robert (1985a, 33).
- 71 Robert (1985a, 61,62).

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